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the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

[74 FR 1828, Jan. 13, 2009]

§ 3.36 Applications for subpoenas for records of or appearances by certain officials or employees of the Commission or officials or employees of governmental agencies other than the Commission, and subpoenas to be served in a foreign country.

(a) *Form.* An application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a request requiring the production of or access to documents, other tangible things, or electronically stored information for the purposes described in § 3.37(a), in the possession, custody, or control of the Commissioners, the General Counsel, any Bureau or Office not involved in the matter, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of a Commissioner, the General Counsel, an official of any Bureau or Office not involved in the matter, an Administrative Law Judge, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, or of an official or employee of another governmental agency, or for the issuance of a subpoena to be served in a foreign country, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this

chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall make a showing that:

(1) The material sought is reasonable in scope;

(2) If for purposes of discovery, the material falls within the limits of discovery under § 3.31(c)(1), or, if for an adjudicative hearing, the material is reasonably relevant;

(3) If for purposes of discovery, the information or material sought cannot reasonably be obtained by other means or, if for purposes of compelling a witness to appear at the evidentiary hearing, the movant has a compelling need for the testimony;

(4) With respect to subpoenas to be served in a foreign country, that the party seeking discovery or testimony has a good faith belief that the discovery requested would be permitted by treaty, law, custom, or practice in the country from which the discovery or testimony is sought and that any additional procedural requirements have been or will be met before the subpoena is served; and

(5) If the subpoena requires access to documents or other tangible things, it meets the requirements of § 3.37.

(c) *Execution.* If an Administrative Law Judge issues an order authorizing a subpoena pursuant to this section, the moving party may forward to the Secretary a request for the authorized subpoena, with a copy of the authorizing order attached. Each such subpoena shall be signed by the Secretary; shall have attached to it a copy of the authorizing order; and shall be served by the moving party only in conjunction with a copy of the authorizing order.

[74 FR 1828, Jan. 13, 2009]

§ 3.37 Production of documents, electronically stored information, and any tangible things; access for inspection and other purposes.

(a) *Availability; procedures for use.* Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents or electronically stored information, as

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defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of § 3.31(c)(1) and in the possession, custody, or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be produced or inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the production or inspection and performing the related acts. Each request may specify the form in which electronically stored information is to be produced, but the requested form of electronically stored information must not be overly burdensome or unnecessarily costly to the producing party. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34. Except as provided in § 3.31(h), requests under this section shall not be filed with the Office of the Secretary, the Administrative Law Judge, or otherwise provided to the Commission.

(b) *Response; objections.* No more than 30 days after receiving the request, the response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form

was specified in the request - the party must state the form it intends to use. The party submitting the request may move for an order under § 3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Production of documents or electronically stored information.* Unless otherwise stipulated or ordered by the Administrative Law Judge, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form in which it is ordinarily maintained or in a reasonably usable form; and

(iii) A party need not produce the same electronically stored information in more than one form.

[74 FR 1829, Jan. 13, 2009]

§ 3.38 Motion for order compelling disclosure or discovery; sanctions.

(a) *Motion for order to compel.* A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the mandatory initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, an interrogatory under § 3.35, or a production of documents or things or access for inspection or other purposes under § 3.37. Any memorandum in support of such motion shall be no longer than 2,500 words. Any response to the motion by the opposing party must be filed within 5 days of receipt of service of the motion and shall be no longer than 2,500 words. These word count limitations include headings, footnotes, and quotations, but do not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and